



**Republic v County Secretary Nairobi City County & another; Ndungu (Exparte) (Application 357 of 2016) [2023] KEHC 24118 (KLR) (Judicial Review) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24118 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION 357 OF 2016  
J NGAAH, J  
OCTOBER 27, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY SECRETARY NAIROBI CITY COUNTY ..... 1<sup>ST</sup> RESPONDENT  
CHIEF OFFICER, FINANCE COUNTY TREASURER NAIROBI CITY  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**GEORGE KAMANDE NDUNGU ..... EXPARTE**

**JUDGMENT**

1. The application before court is a motion dated 19 April 2023 expressed to be brought under Order 51 rule 1 of the Civil Procedure Rules. It is an application in which the applicant claims that the respondents are in contempt of a court order and, therefore, he is seeking warrants of arrest for the respondents to be arrested and ordered to pay party and party costs due to the applicant. The pertinent prayers to this end have been expressed as follows:

“3. That warrants of arrest do issue against the County secretary, Nairobi city County and the Chief Officer/Finance and County Treasurer for defaulting on this honourable court’s orders of 24 February, 2022.

4. That further, the respondent be ordered to pay forthwith the entire sum of Kshs. 238,924/= being the taxed bill of costs as between party and party therein allowed on 19<sup>th</sup> July, 2018 as per the certificate of order against the City County



of Nairobi dated 17<sup>th</sup> February, 2021 together with interest thereon at the rate of 12% p.a. from the 17 February 2021, until payment in full.”

2. The application is supported by the affidavit sworn on 19 April 2023 by Mr. Charles Ngugi, the learned counsel for the applicant.
3. According to Mr. Ngugi, on 24 February 2022, this Honourable Court ordered the respondents to pay the applicant a sum of Kshs. 238,924/= being taxed party and party costs due to the applicant. The respondents were further ordered to pay interest at the rate of 12% per annum from 17 February 2021 until payment in full in default of which contempt proceedings were to be initiated against them.
4. The order was served upon the respondents “through the office of the County Attorney and the same was duly received on 29 March 2022”.
5. More than a year after service of the order, the respondents have neither complied with it and settled the applicant’s costs nor responded to the applicant’s demand letter dated 29 March 2022 warning them of the dire consequences of disobeying the order. Going by the respondent’s conduct, it is unlikely that they will comply with the order.
6. The respondents did not respond to the applicant’s application. Nonetheless, the applicant’s motion has to be determined on its own merits.
7. At the hearing of the application Mr. Mwangi, the learned counsel for the applicant did not submit but only asked the court to allow the application.
8. Disobedience of a court order or judgment is the foundation for contempt of court proceedings against the contemnor. It is, therefore, a necessary prerequisite that before one is held to be in contempt, it must be demonstrated that he was aware of the order or judgment he is alleged to be in contempt of. In other words, proof of service of the order or judgment is necessary unless, for reasons to be stated, the court dispenses with service of the order or judgment on the alleged contemnor.
9. But service is just one of the conditions that an applicant has to meet in contempt of court proceedings. The other condition is a warning to the alleged contemnor of the penal consequences that may ensue if the order is not complied with. In this regard, there has to be permanently displayed on the front copy of the judgment or order served a warning to the person required to do or not to do the act in question that disobedience to the order would be contempt of court punishable by imprisonment, a fine or sequestration of assets. It has been held that without this display, the judgment or order may not be enforced unless it is an undertaking contained in a judgment or order.
10. The need to comply with these conditions, amongst other conditions, is a question that has been settled by the Court of Appeal in its previous decisions where this question has arisen.
11. In the case of Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation (1994) eKLR, for instance, the twin issues of the necessity for personal service of both the order and the application for contempt and the endorsement on the face of the order with what is popularly referred to as ‘the penal notice’ were discussed. As far as service is concerned the Court of Appeal noted as follows:

“The law on the question of service of order stresses the necessity of personal service. In Halsbury’s Laws of England (4th Ed) Vol 9 on p 37 para 61 it is stated:

“61. Necessity of personal service.



As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question ...”

Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order ...”

The court further noted:

“Keeping the importance of personal service of the order in mind we now take a look at the aforesaid two copies of the order both of which bear the stamp of Wetangula & Co Advocates, in acknowledgement of receipt of the said orders. Service on Wetangula & Co does not constitute personal service on any of the three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two orders on Wetangula & Co, Advocates, on 25th October, 1993, and 1st November, 1993, therefore, is a wasted effort.”

12. The court described personal service as “an elementary but mandatory procedural rule which in contempt proceedings has (been) prescribed “personal service”.
13. And on the need for endorsement of the order with the requisite warning of penal consequences, the court stated as follows:

“Mr Lakha pointed out other flaws to which we will now turn our attention. He referred to the order and also to the application itself and pointed out the absence of a notice in the form of an endorsement thereon of penal consequences. It is not disputed that the copies of the order alleged to have been served on the three alleged contemnors and handed in by Mr Nowrojee during the hearing (instead of having been annexed to the application) do not bear any such endorsement of penal consequence. Section 5(1) of the Judicature Act has given this Court the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. In England rule 5 of order 45 R S C 1982 Ed, governs the method of the enforcement by the Court of its judgments or orders in circumstances amounting to contempt of court (p766). Order 45/7 deals with matters relating to “Service of copy of judgment, etc, pre-requisite to enforcement under rule 5”. (The underlining is ours). The relevant procedural obligation is succinctly stated in order 45 rule 7/5 of the RSC 1982 Ed as follows:

“It is a necessary condition for the enforcement of a judgment or order under rule 5 by way of sequestration or committal, that the copy of the judgment or order served under this rule should have the requisite penal notice indorsed thereon.

And a couple of paragraphs later is given the form that an endorsement is required to take, in the following words in the case of a judgment or order requiring a person to abstain from doing an act:

If you, the within named A B disobey this judgment (or order) you will be liable to process of execution for the purpose of compelling you to obey the same.”



A similar form with suitable alterations is given in the case of an order against a corporation.

This Court in Court of Appeal Civil Appeal No 95/1988 Mwangi H C Wang'ondu v Nairobi City Commission (UR) confirmed the mandatory nature of the requirement of endorsement of notice of penal consequence on the order in the following words:

“In the present case, according to the affidavit of the appellant sworn on 26th January, 1988, in support of his application, the order alleged to have been disobeyed by the respondent was served on the respondent on 31st August, 1987, and a copy of that order which was annexed to the affidavit did not carry a notice of the penal consequences of disobedience as required by the Rules. It is clear from this that the appellant did not comply with the mandatory provisions of section 5(1) of the *Judicature Act* with the result that his application was incompetent. It must follow that there was no valid application for contempt of court before the judge.”

14. The court concluded its discussion on this point by stating as follows:

“As the copies of the orders produced before us are not so endorsed as required under the mandatory provisions of section 5(1) of the *Judicature Act* (cap 8) this application is incompetent and deserves to be dismissed on this account also.”

15. Rule 85.5 of the Civil Procedure (Amendment No. 3) Rules 2020 of England which would apply to contempt of court proceedings in this country by dint of section 5 of the *Judicature Act*, cap. 8 also require that the order or judgment be served and be endorsed with the requisite notice. It reads as follows:

81. 4.

- (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
- (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
  - a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
  - (b) the date and terms of any order allegedly breached or disobeyed;
  - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
  - (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
  - (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
  - (f) the date and terms of any undertaking allegedly breached;
  - (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;



- (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
- (i) that the defendant has the right to be legally represented in the contempt proceedings;
- (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public. (Emphasis added).

Of particular relevance is Rule 84.4 (2)(a) and (c).

16. The applicant's application falls short of the two conditions of personal service and the endorsement of the order with the penal notice. I say so because what is stated to have been served is a letter allegedly containing a copy of the order.
17. Mr. Charles M. Ngugi, the learned counsel for the applicant who purportedly served the order states in his affidavit of service as follows:
  - “2. That on 29 March, 2022, I proceeded to the officers of the County Attorney, Nairobi City County situated at City Hall Nairobi, where at around 10. 05 AM I served a copy of a letter of even date and an order issued on 22<sup>nd</sup> March, 2022 to the secretary of the County Attorney and she accepted service of the same by stamping my copy which I return herewith duly served.”
18. From this deposition, it is apparent that it is the “county attorney” and not any of the alleged contemnors that was served. It has been noted that the Court of Appeal in Nyamodi Ochieng



Nyamogo & Another versus Kenya Posts & Telecommunications Corporation supra deprecated the practice of service of the order to the alleged contemnor's advocate rather than to the contemnor himself and described such service as "a wasted effort".

19. It is also apparent on the face of the order that the order was not indorsed with the penal notice.
20. Again, as the Court of Appeal has clearly stated, where the order or decree is not clearly endorsed with the penal notice, the application is incompetent and has to be dismissed.
21. In the ultimate, I find the applicant's application to be fatally defective and incompetent. It is hereby dismissed. Considering that the decree has not been settled, I make no order as to costs. It is so ordered.

**DATED, SIGNED AND DELIVERED AT WAJIR ON 27 OCTOBER 2023**

**NGAAH JAIRUS**

**JUDGE**

